IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1357 OF 2003

Shri Rajan Ramchandra Haldankar,
aged 37 years, residing at
197/B, Bhagyeshwar Bhavan,
Room No.39-A, Dilip Gupte Road,
Mahim, Mumbai 400 016.
(At present detained at Arthur Road
Central Prison, Mumbai) ..Appellant.
(Orig.Accused)

V/s.

1. State of Maharashra.
(at the instance of Mahim Police Stn.)

2. Mauda Prabhakar Thakur,
Dilip Gupte Road, Mumbai-16. ..Respondent.
(orig.comp.)

Shri S.K.Chinchalikar for Appellant.

Mr.V.B.Konde-Deshmukh, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 29, 2006.

ORAL JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the Additional Sessions Judge for Greater Bombay dated October 30, 2003 in Sessions Case No.638 of 1996. The appellant was chargesheeted and tried for offences punishable under section 394 and 397 of the I.P.Code. The appellant was tried for the following charges.

> . "I, Shri K.P.Purohit, Addl.Sessions Judge for Gr.Mumbai do hereby charge you :
>
> **Rajan Ramchandra Haldankar**
>
> as under:
>
> FIRSTLY : That you above mentioned accused on 11.8.94 at about 17.00 hours at Thakur Beedi Shop No.7, Meeli Building, Deelip Gupte Road, Mahim, Mumbai-16 you voluntarily caused hurt by means of chopper on left cheek and on both hands to complainant Prabhakar Atmaram Thakur while committing robbery of cash of Rs.800/- and thereby you committed an offence punishable U.S. 394 of IPC.
>
> SECONDLY : That you accused above named on the aforesaid day, time and place committed robbery and while committing robbery you used deadly weapon namely chopper and caused grevious hurt to Prabhakar Atmaram Thakur and thereby you have committed an offence punishable U/s. 397 of IPC.
>
> . And I hereby direct that you be tried on the aforesaid charges."

The trial Court on analysing the evidence on record has accepted the prosecution version that the evidence of P.W.1 and P.W.3 inspires confidence and establishes the fact that the appellant entered the shop of complainant-Prabhakar Atmaram Thakur and assaulted him with dangerous weapon like Chopper causing injury to the complainant. The incident in question occurred at around 5 p.m. on 11th August, 1994. Wife of complainant (P.W.1) and P.W.3 rushed with the complainant to the nearby private hospital namely Shushrusha Hospital. The complainant was

treated in the said hospital. The medical record of the hospital mentions the nature of injury caused to the complainant. The trial Court has accepted the version of P.W.1 and P.W.3 as sufficient to proceed against the appellant for the alleged offence. The trial Court has also adverted to the evidence of Doctor (P.W.5) who was working in the Corporation Hospital at the relevant time, where the complainant was later on taken for further treatment. The trial Court has also adverted to the evidence of Investigating officers P.W.6 and P.W.7. The trial Court has proceeded to hold that taking overall view of the evidence on record, it was obvious that the prosecution has established the complicity of the appellant in the commission of the alleged offence. My understanding of the Judgment of the trial Court, as is rightly argued by the counsel for the appellant, is that, the trial Court proceeded to hold that prosecution has established in evidence that the appellant entered the shop of the complainant and assaulted the complainant with chopper, causing injury to the complainant. There is no positive finding of the trial Court that the appellant also engaged himself in the offence of robbery. Although the prosecution case was that after the appellant entered the shop he demanded the amount of Rs.5,000/-

from the complainant and on refusing to pay that amount assaulted the complainant by chopper. However, neither the P.W.1 nor P.W.3 has spoken about this fact as alleged by the prosecution. There is absolutely no legal evidence on record to hold that the appellant had demanded any amount from the complainant after entering his shop and that the complainant having failed to pay that amount committed robbery and while committing robbery injured the complainant by means of dangerous weapon. I shall advert to this aspect in detailed a little later.

2. Having considered the rival submission and going through the evidence on record, I have no hesitation in upholding the opinion recorded by the trial Court that the evidence of P.W.1 and P.W.3 does indicate the complicity of the appellant in assaulting the complainant after entering his shop on the fateful day. The complainant and P.W.1 were staying in the rear portion of the said shop. P.W.1-wife of the complainant was present in the house. When she heard shouts of the complainant, she rushed outside and saw that the appellant was walking out of the shop holding dangerous weapon i.e. chopper in his hand. The complainant was badly injured and was

profusely bleeding. Prosecution has examined P.W.3 to support the version of P.W.1. He has deposed that after the complainant was injured and was lying near the shop, the crowd had gathered but nobody came forward for help. He volunteered to help the complainant to shift to the nearby hospital. While on his way to the hospital the complainant disclosed to him that he (complainant) was attacked by the appellant. There is no challenge to this version of the P.W.3. The fact that the complainant was badly injured is seen from the medical report and register maintained by the hospital. To this limited extent, I have no hesitation to uphold the finding recorded by the trial Court that the appellant was responsible for the assault on the complainant causing injury to the complainant. Incidentally, the complainant could not be examined by the prosecution, as he was dead by the time the trial commenced. We are therefore, left with the evidence of P.W.1-his wife and P.W.3.

3. Indeed, the counsel for the appellant would contend that the prosecution evidence was not sufficient to proceed against the appellant even on the allegation that the appellant was responsible for the injury caused to the complainant. It is submitted that P.W.1 cannot be said to be the

eye-witness to the actual assault as such. Besides, P.W.1 has not named the appellant immediately, even though she had opportunity to do so while admitting the complainant in the hospital. Similarly, P.W.1 has not named the appellant in the statement before the police immediately. In fact, the statement of P.W.1 was recorded belatedly. There was inordinate delay. I am not impressed by any of these contentions.

4. The fact that P.W.1 did not name the assailant while giving history of the injury in the hospital is of no avail. Obviously, she must have given information as was asked to her by the hospital staff. The hospital staff was not required to know the name of the assailant but only the reason of injury. This cannot be basis to doubt the veracity of the evidence given by P.W.1, who is the natural witness and present in the rear portion of the premises. In so far as the argument regarding inordinate delay in recording the statement of P.W.1 and 2 is concerned, the trial Court has dealt with that aspect in paragraph 20. The sequence of events that unfolded before the statements of the complainant and thereafter prosecution witnesses were recorded, that explanation has been accepted by the

trial Court. That approach, to my mind, seems to be the correct approach adopted by the trial Court.

5. To my mind, the evidence of P.W.1 is reliable to the extent that she had seen the appellant walking out of the shop immediately after the complainant raised shout after he was attacked by the appellant. The appellant was seen walking out of the shop holding chopper in his hand. The injury which was caused to the complainant was possible by such dangerous weapon, is stated by the Doctor. The fact that injury was caused to the complainant is established from the medical records. The version of P.W.1 is corroborated by the evidence of P.W.3 who was told by the complainant himself while being taken to the hospital that he (complainant) was assaulted by the appellant. The version of P.W.3 has been accepted by the trial Court and in my view rightly. There is no reason to depart from the opinion of the trial Court.

6. In other words, evidence of P.W.1 and P.W.3 is sufficient to indicate complicity of the appellant and to establish that the appellant was responsible for the assault and injury caused to the complainant. Counsel for the appellant would then contend that the

recovery of the weapon has not been proved as the panch witness has turned hostile. Even this argument is of no avail to the appellant. Merely because the panch witness has turned hostile, that does not undermine the entire prosecution case. The prosecution case is established from the evidence of P.W.1, P.W.3, P.W.5 as well as P.W.6 and P.W.7.

7. Even if the prosecution case that the appellant was responsible for the assault and to cause injury to the complainant is accepted as it is, the question is: whether the prosecution has proved the charge of robbery. The counsel for the appellant submits that there is absolutely no legal evidence with regard to the allegation that the appellant on entering the shop of complainant demanded amount of Rs.5,000/- and as the complainant refused to pay that amount appellant attacked the complainant. There is substance in this argument of the appellant. There is no legal evidence to even remotely establish the fact that on entering the shop the appellant made any demand of Rs.5,000/- to the complainant as such. There is also no evidence of the fact that after assault while going away, the appellant took any article, cash or belongings of the complainant lying in the shop. If so, the appellant will be justified

in contending that the case cannot proceed for offence under Section 394 and 397 of I.P.Code.

8. That however, will not absolve the appellant in entirety. The appellant in that case will be liable to be proceeded for offence punishable under section 324 or 325 of I.P.Code. According to the Public Prosecutor, for the nature of injury caused, the offence will be punishable under section 325 of I.P.Code, as grievous hurt has been caused to the complainant. However, according to the appellant, there is no medical evidence to support the case that the complainant suffered grievous hurt. This aspect will have to be answered on the basis of evidence of Dr.Neeta A. Patel(P.W.5). Dr.Neeta Patel was attached to Sion Hospital, which is a Corporation hospital. She has deposed that on 12th August, 1994 at about 9.32 a.m., complainant was brought to the hospital for treatment and he was later on discharged on 17th August, 1994 at 2 p.m.. She has further deposed that the injured was admitted with the alleged history of chopper injuries to left forearm, left side of face and right arm. She concedes that she has not personally attended the injured but was deposing on the basis of treatment papers which are maintained in the ordinary course of hospital

functioning. She has stated that the injuries were fresh. She has then stated that she had issued the injury certificate dated 13th December, 1994. She has then stated that contents of the said certificate are in her handwriting and it bears her signature. She states that she has mentioned the contents in the said certificate on the basis of the original treatment papers. Injury Certificate has been exhibited as Exh. 15. She then states that the injury caused to the complainant was possible by weapon Article 1-C chopper. She has placed on record original treatment papers which were marked as Exh.16 collectively. She then states that after going through the treatment papers she cannot say with authority that she had seen the patient. She states that she might have seen the patient or might not have seen the patient. She accepts that patient was seen by Dr.Parag Sahastrabudhe. However, Dr.Sahastrabudhe is not examined. She then states that some of the entries in the hospital record pertaining to patient are in the handwriting of Dr.Sahastrabudhe and under his signature. She has also deposed that she can recognise the handwriting and signature of even other doctor Dr.Alexander. Nowhere in the examination-in-chief, P.W.5, has spoken about the nature of or details of the injury

caused to the complainant or for that matter whether the said injuries were simple injuries or grievous injuries. The appellant is, therefore, justified in contending that although the prosecution has succeeded in establishing that the complainant had suffered injury but the Doctor has not opined that the said injuries were grievous injuries as such. On this premiss the appellant contends that the case will not be covered under section 325 of I.P.Code, but at best, will be one under section 324 of I.P.Code. There is substance in this argument. Suffice it to observe that the legal evidence to establish the fact that the complainant had suffered grievous hurt in terms of section 320 of the I.P.Code is lacking. It may be mentioned that it is not the case of the appellant that the hurt caused to the complainant was on account of grave and sudden provocation to be covered under provisions of Section 334 of I.P.Code. It necessarily follows that the case will be covered by section 324 of I.P.Code. If so, the appellant will have to be held guilty of offence punishable with imprisonment of either description for a term which may extend to three years or with fine, or with both.

9. Accordingly, this appeal partly succeeds.

The impugned Judgment and Order is set aside to the extent of having recorded finding of guilt for offence punishable under section 394 and 397 of I.P.Code. Instead, the appellant is convicted for the offence punishable under section 324 of I.P.Code and sentenced to suffer Rigorous imprisonment for three years with fine of Rs.5,000/- in default to suffer further rigorous imprisonment for one month.

10. It appears that the appellant is in jail since 30th October, 2003 and has also paid the amount of fine of Rs.5,000/- in terms of order passed by the trial Court. If so, the appellant may be set at liberty, unless required to undergo sentence in any other offence, after he has completed the period of sentence awarded under this order. Ordered accordingly.